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Appellant Questions and Answers

Introduction

As a Federal employee, you have an obligation to do your job efficiently, honestly and courteously. The Federal Government, as your employer, has an obligation to maintain a personnel system that balances the interests of its employees, the agencies that employ them, and the public they serve.

In order to meet its obligation, the Government must sometimes take personnel actions that adversely affect employees. When it does so, it must ensure that those employees are protected from unfair or arbitrary treatment. Under the Civil Service Reform Act of 1978 (CSRA), most Federal employees may appeal various personnel actions affecting them to the U.S. Merit Systems Protection Board (MSPB or Board).

This publication provides general information about your rights when such actions are taken against you and discusses the Board's appeals process. *The discussion applies to typical proceedings before the Board and is not all-inclusive, nor is the information regulatory in nature.* Specific appealable actions are governed by the pertinent statutes, regulations, and case law. *Some laws have specific requirements for handling appeals that differ from those described in this publication.* See question #27. Further, the Board's regulations were substantially revised as of November 13, 2012. If your appeal was filed on or after that date, or if the Administrative Judge has informed you that the new regulations apply to your appeal, you must be sure that you are following the requirements of those regulations since printed versions to which you may have access may not be the current regulations.

1. What is the U.S. Merit Systems Protection Board?

The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch of the Federal Government that serves as the guardian of Federal merit systems. The Board is composed of three members who are appointed by the President and confirmed by the Senate. They serve overlapping, non-renewable 7-year terms. The Board is bipartisan. No more than two of its three members may be from the same political party.

2. Where is the Board located?

The Board's headquarters is in Washington, DC. It has regional and field offices in major cities. The Board's regional and field offices and the geographic areas they serve are listed on the MSPB Web site at www.mspb.gov.

3. How can I get information about the Board and the appeals process?

Information about the Board is available on the MSPB Web site at www.mspb.gov. You can send email to the Board at mspb@mspb.gov, or telephone, toll free, and leave a message at 1-800-209-8960.

4. Does the Board hear all types of Federal employee appeals?

No. The CSRA authorized the Board to hear appeals of various agency actions, including most appeals previously heard by the Civil Service Commission and appeals arising from new causes of action created by the CSRA. Certain other actions may be appealed to the Board under regulations of the Office of Personnel Management (OPM). Since a principal purpose of the CSRA was to streamline Federal personnel management, Congress did not make all personnel actions appealable to the Board.

5. What kinds of actions may be appealed to the Board?

Under the CSRA, the majority of the cases are appeals of agency adverse actions--removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force actions, OPM suitability determinations, OPM employment practices, OPM determinations in retirement matters, denials of restoration or reemployment rights, and terminations of probationary employees under certain circumstances. A more complete listing is found in the Board's regulations at 5 CFR 1201.3(a). See question #27 for descriptions of other statutes that provide for appeals to the Board.

6. What can I do if I am affected by a personnel action that is not appealable to the Board?

- Some actions that are not appealable to the Board may be appealable to OPM or may be covered by agency grievance procedures.



- If you are a member of a bargaining unit, actions covered under a negotiated grievance procedure may be grieved in accordance with that procedure.
- If a personnel action (whether appealable to the Board or not) is taken or about to be taken as a result of a prohibited personnel practice, you may file a complaint with the Office of Special Counsel, asking the Special Counsel to seek corrective action from the Board on your behalf.

7. May all Federal employees file appeals with the Board?

No. The employees and others (e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions to the Board vary in accordance with the law and regulations governing those actions. In some cases, classes of employees, such as political appointees, are excluded. Employees of specific agencies are excluded with respect to certain actions.

8. Who may appeal an adverse action to the Board?

Employees who may appeal adverse actions are:

- Employees in the competitive service who have completed a 1-year probationary or trial period and those who have completed one year of current continuous service under other than a temporary appointment limited to 1 year or less;
- Veterans preference-eligible employees with at least one year of continuous employment in the same or similar positions outside the competitive service;
- Postal Service supervisors and managers, and Postal Service employees engaged in personnel work (other than those in nonconfidential clerical positions), who have completed one year of current continuous service in the same or similar positions; and
- Excepted service employees, other than preference-eligibles, who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service and those who have completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less.

9. Do agencies have to advise employees of their right to appeal personnel actions to the Board?

When an agency takes an appealable action against an employee, the agency must provide the employee with: (1) a notice of the time limits for appealing to the Board, (2) the address of the appropriate Board regional or field office for filing the appeal, (3) a copy or access to a copy of the Board's regulations, (4) a copy of the Board's appeal form, (5) a notice of any rights concerning the agency grievance procedure or a negotiated grievance procedure, whether an election must be made between available options, and the effect of such an election, and (6) notice of any right to file a complaint with the Equal Employment Opportunity Commission. You may not be advised of other potential rights. See question #27 for a description of other statutes that may apply.

10. Does the Board hear appeals from employees who are covered by a negotiated grievance procedure?

If an employee is a member of a bargaining unit that is represented by a union or an association, the bargaining agreement may have a negotiated grievance procedure available to the employee. Many times, the grievance procedure will cover personnel actions that by law may otherwise be appealed to the Board. If a bargaining unit employee is covered by such a "broad scope" grievance procedure, then the employee has a choice between filing either a grievance with the agency or an appeal with the Board, *but may not do both*. In some circumstances, however, an employee who filed a grievance and claims discrimination affected the grieved action may request the MSPB to review a final decision under the grievance system.

(Under the terms of some union contracts, Postal Service employees may be able to pursue a grievance under the negotiated grievance procedure and also file an appeal with the Board.)

11. Does the Board hear complaints of discrimination in connection with personnel actions?

Generally, yes, if the personnel action can be appealed. See question 5. If an employee alleges discrimination in connection with most actions that are otherwise appealable to the Board, the Board has jurisdiction over the matter. Discrimination allegations that do not involve actions within the Board's jurisdiction may be pursued through the employing agency and the Equal Employment Opportunity Commission (EEOC).

12. How do I file an appeal with the Board?

- You must file an appeal in writing with the Board's regional or field office serving the area where your duty station was located when the action was taken. Appeals of final retirement or suitability decisions issued by the Office of Personnel Management must be filed with the regional or field office serving the area where you live.
- An appeal must be filed within 30 calendar days of the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision,



whichever is later. If the 30th day falls on a Saturday, Sunday, or Federal holiday, the filing deadline is extended to the next working day.

- If you and the agency mutually agree *in writing* to submit your dispute to an alternative dispute resolution (ADR) process, the 30-day filing time limit is automatically extended to 60 days.
- Special statutory time limits apply to filing appeals under certain laws. See question #27.
- Appeals may be filed by mail, by facsimile, by commercial overnight delivery, by personal delivery, or by the Board's electronic filing procedure, e-Appeal Online (<https://e-appeal.mspb.gov/>). Appeals and other submissions may not be made by email. The date of filing by mail is considered to be the postmark date. The date of filing by facsimile is the date of the facsimile. The date of filing by commercial overnight delivery is the date you deliver the appeal to the commercial overnight delivery service. The date of filing by e-Appeal is the date of the electronic submission.

13. Does the appeal have to be in a particular format?

Although an appeal may be in any format, it must be *in writing and contain all of the information specified in the Board's regulations*. A form that meets all of the Board's requirements is available on the Board's website, www.mspb.gov and may be available in agency personnel offices. An appeal *must be signed by you or your representative*, if you have designated one.

14. Do I have any recourse if I miss the deadline for filing an appeal?

Yes, but if you file an appeal after the deadline for filing, you must show a good reason for the delay and include supporting evidence. The Administrative Judge will provide an opportunity for you to show why your appeal should be accepted even though you filed late.

15. May the agency respond to my appeal?

An agency has the right to respond to an appeal but must do so within 20 calendar days of the date of the Board's order acknowledging receipt of the appeal. If a response is not submitted within the time limit, and the agency does not show good cause for an extension, the case will proceed and may be decided on the basis of the available information.

16. Who can represent me in an appeal before the Board, if I choose to have a representative?

You can choose any person to represent you as long as that person is willing and available to serve. You can also represent yourself. Typical representatives include private attorneys, union attorneys, and other union representatives. The agency may challenge your representative on the basis of conflict of interest or conflict of position. If your representative is disqualified, you will be given a reasonable time to obtain another representative.

17. Who decides my appeal?

When a Board regional or field office receives an appeal, the case is assigned to an Administrative Judge in that office. The Administrative Judge will issue a decision considering all of the relevant evidence in the case after allowing the parties to develop a record.

18. Are hearings held on all appeals?

Once it is established that your appeal was timely filed and that the Board has jurisdiction, you have a right to a hearing on the merits of your case for most types of appeals: You may present evidence, including the testimony of witnesses, at the hearing. However, you may waive the right to a hearing and choose instead to have the appeal decided on the basis of the written record, which will include all pleadings, documents and other materials filed in the proceeding. Sometimes hearings are conducted by telephone or video conferencing rather than in person.

19. Who has the burden of proof in appeals proceedings?

The Agency: The agency has the burden of proving that it was justified in taking the action. If the agency meets its burden of proof, the Board must decide in favor of the agency, unless you show that there was harmful error in the agency's procedures, that the agency decision was based on a prohibited personnel practice, or that the decision was not in accordance with the law.

The Appellant: You have the burden of proving that your appeal is within the Board's jurisdiction and that it was timely filed. You also have the burden of proving any "affirmative defenses" that you raise, for example, discrimination or reprisal for whistleblowing. You also have the burden of proof on most issues in retirement cases.

20. Is the decision issued by the Administrative Judge final?

The initial decision of the Administrative Judge will become the final decision of the Board 35 days after the date of the decision unless a party files a petition for review with the 3-member Board in Washington. *A petition for review by the MSPB must be filed within 35 days after the date the initial decision is issued or within 30 days after the date you receive the initial decision, whichever is later.* If you are represented, the period begins to run from first receipt, whether it is by you or your representative.



21. How does the Board decide whether to grant a petition for review?

The Board may grant a petition for review when it is established that the initial decision contains erroneous findings of material fact; there is *new significant evidence or legal argument* that was not available when the record was closed; the Administrative Judge's rulings were not consistent with procedures or constituted an abuse of discretion and the error affected the results; or that the Administrative Judge's decision is based on an *erroneous interpretation of law or regulation or an erroneous application of the law to the facts of the case*. The Board's decision on a petition for review constitutes final administrative action.

22. If the initial decision is in my favor, and the agency (or another party) files a petition for review, do I have to wait for relief until the Board issues a decision?

If you are the prevailing party, the agency will grant you any relief provided in the initial decision pending the outcome of any petition for review if the Administrative Judge orders "interim relief." If the Administrative Judge determines that interim relief is appropriate and if the decision requires your return to the workplace, the agency does not have to take this action if it determines that such a return would be unduly disruptive. However, it still has to restore you to pay and benefits status. The granting of interim relief does not require the payment of back pay or attorney fees.

23. What actions may Administrative Judges take on appeals?

The initial decision of the Administrative Judge may dismiss the appeal if the matter is not within the Board's jurisdiction or if the appeal was not filed within the required time limit and good cause for the untimely filing is not shown. Appeals that are not dismissed may be settled voluntarily by the parties. If the parties wish to have the settlement agreement enforceable by the Board, they must ask the Administrative Judge to enter the agreement into the record. In appeals that are decided on the merits (not dismissed or settled), the decision of the Administrative Judge may affirm the agency's action, reverse the action, or--in certain cases--mitigate (modify) the penalty imposed by the agency.

24. What actions may the Board take on petitions for review?

The Board may dismiss a petition if it determines that the matter is not within the Board's jurisdiction or if the petition was not filed within the required time limit and good cause for the untimely filing is not shown. The Board may deny a petition if it does not meet the criteria for review. See question #21 above. If the Board grants a petition, its final decision may affirm or reverse the initial decision of the Administrative Judge, in whole or in part. The Board may also modify the decision of the Administrative Judge, vacate it, or remand (send back) the case to the Administrative Judge for further processing.

25. What can I do if I am dissatisfied with the final decision of the Board?

You can request court review. Once an initial decision of an Administrative Judge has become final or the Board has issued a final decision on a petition for review, you can seek review of the final decision by the U.S. Court of Appeals for the Federal Circuit. Your request for review must be filed within 60 days after the Board issues notice of the final order or decision of the Board. The court normally will not waive this time limit, and filings that do not meet the deadline will be dismissed.

In cases involving allegations of discrimination, you may seek review of the final Board decision by the Equal Employment Opportunity Commission (EEOC) or you may file a civil action in an appropriate U.S. district court within 30 days of your receipt of the decision.

26. What happens if I appeal a case involving an allegation of discrimination to the Equal Employment Opportunity Commission?

In a case appealable to the Board that involves an allegation of discrimination (a "mixed case"), you may ask the EEOC to review the Board's final decision on the discrimination issue. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to the Board. If the Board does not adopt the EEOC decision, then the case is referred to a Special Panel made up of a Chairman appointed by the President, one member of the Board, and one EEOC commissioner. The Special Panel issues the final decision in the case, which then may be appealed to an appropriate U.S. district court.

27. Do the procedures described in this publication apply to all appeals to MSPB?

Some laws that authorize appeals to MSPB include procedural requirements that differ from the general procedures described in this publication. Such laws may require that you first exhaust the procedures of another agency before filing with MSPB, and the time limits for filing differ from those discussed in this publication. Also, because the basis for an appeal to MSPB is an alleged violation of one of these laws, you cannot expect your agency to advise you of an alleged violation and a right to appeal to MSPB. Laws with different procedural requirements include the following:

- *Whistleblower Protection Act of 1989* (Public Law No. 101-12) - This law authorizes an appeal to MSPB if you allege that you were subject to an agency action that was taken or threatened (or is about to be taken or threatened) because of certain legal disclosures of information, commonly known as whistleblowing. Unless the matter is directly appealable to the Board under law, rule or regulation, you must first file a complaint with the Office of Special Counsel and exhaust the procedures of that office. The special provisions applicable to whistleblower appeals are discussed in the Whistleblower Q&A section of this web site. Also see Title 5 of the U.S. Code, section 1221, and the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1209.



- *Presidential and Executive Office Accountability Act* (Public Law No. 104-331) - This law authorizes appeals to MSPB by employees of the Executive Office of the President, the White House Residence, and the official residence of the Vice President that allege violations of certain workplace laws, including the Family and Medical Leave Act and the Fair Labor Standards Act. You must first exhaust a mandatory period of counseling and mediation with the employing agency. Any subsequent appeal to MSPB must be filed no earlier than the 30th day and no later than the 90th day after you receive notice of the end of the mandatory period of counseling and mediation. See Title 3 of the U.S. Code, Chapter 5.
- *Uniformed Services Employment and Reemployment Rights Act (USERRA)* (Public Law No. 103-353) - This law authorizes an appeal to MSPB based on an agency's alleged violation of your employment or reemployment rights following your service in a uniformed service (including discrimination based on such service or your obligation to perform it, or on your status as a veteran). You have the option of appealing directly to MSPB or filing a complaint with the Department of Labor's Veterans' Employment and Training Service (DOL/VETS). If you file with DOL/VETS, you must first exhaust that agency's procedure and may appeal to MSPB later if DOL/VETS cannot resolve the matter. See Title 38 of the U.S. Code, Chapter 43, and the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1208. In lieu of filing an appeal directly to the Board after receipt of the DOL/VETS's notice, you may request that the Secretary of Labor refer the complaint to the Special Counsel. If the Special Counsel agrees to represent you, then he or she will file your appeal to the Board; you may file it if the Special Counsel does not choose to represent you.
- *Veterans Employment Opportunities Act* (Public Law No. 105-339) - This law authorizes an appeal to MSPB based on an agency's alleged violation of any law or regulation relating to veterans' preference. You must first file a complaint with DOL/VETS and allow that agency 60 days to resolve the matter. If DOL/VETS advises you that it has been unable to resolve the matter, an appeal to MSPB must be filed within 15 days after the date you receive the DOL/VETS notice. See Title 5 of the U.S. Code, sections 3330a, 3330b, and 3330c, and the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1208.
- *Appeals of removal, demotion, or suspension for more than 14 days based on performance or misconduct in the Department of Veterans Affairs* - Pursuant to 38 U.S.C. § 713(c)(4)(B) an appeal of one of these actions "may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension." In addition, the agency's burden of proof is lowered to substantial evidence; the Board may not mitigate the action effected by the agency; and a final and complete decision must be issued within 180 days.

Additional information on the appeal rights of veterans is available on the Web sites operated by the Office of Personnel Management (www.opm.gov, choose "Veterans" from the menu) and DOL/VETS (<https://www.dol.gov/vets/>).

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